IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24/07/2003

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THE HONOURABLE MR. JUSTICE K.P.SIVASUBRAMANIAM

WRIT PETITION No.5308 OF 1996
and
W.M.P.No.8386 of 1996

P.Sathyanathan .. Petitioner.

-Vs-

1. State of Tamil Nadu,
represented by tis Commissioner
of Collegiate Education,
College Road,
Madras-6.

2. The Joint Director of
Collegiate Education,
Madurai Region,
Madurai-20.

3. The Deputy Director of
Collegiate Education,
Madurai Region,
Madurai - 20.

4. Pasumpon Thiru Muthuramalingam
Thevar Memorial College,
represented by its Principal,
Kamudhi, Ramnad District.

5. Lakshmikanth .. Respondents.

Petition filed under Article 226 of the Constitution of India for the issue of a writ of certiorarified mandamus as stated therein.

For petitioner : Mr.K.V.Subramanian

For respondents 1 to 3 : Miss. G.Kavitha,
Govt. Advoccate.
For 5th respondent : Mr.B.Vijay Narayan.

:ORDER
The petitioner seeks for the issue of a writ of certiorari to call for the records relating to the order of the third respondent, dated 6.12.1994 appointing the fifth respondent as Junior Assistant in the fourth respondent's College as confi order of the second respondent dated 1.3.1995 and to promote the petitioner as Junior Assistant in the fourth respondent's college.

2. According to the petitioner, he was appointed as a Herbarium Keeper on 23.2.1983 under the fourth respondent. He was regularly appointed in a permanent post which was also duly approved by the competent authority. On 23.2.1993 he was upgraded as Selection Grade Herbarium Keeper. He has also passed his Higher Secondary Examination in the year 1986 and became a Graduate in April,1990 and completed his Post Graduate course in Political Science in April, 1993. He has also passed Typewriting higher grade in English and lower grade in Tamil. He has also passed the District Office Manual in May, 1991 and hence he was qualified to hold any post in the category right from the post of Junior Assistant to the Manager.

3. The post of Junior Assistant became vacant with effect from 3.2.1989. The post was kept vacant even though he and his senior Hyder Ali were fully qualified for the post. In terms of Tamil Nadu Private Colleges (Regulations) Act, (hereinafter called "the Act") the post of Junior Assistant ought to have been filled up from the feeder category of Laboratory Assistant and Herbarium Keeper, but no steps were taken by the respondents in an unjust manner. In the mean while, the father of the fifth respondent who was Selection Grade Lecturer and Principal in-charge, died on 27.2.1994. The fifth respondent applied for appointment on compassionate ground to the post of Junior Assistant, even though at that point of time he was a minor and had completed only S.S.L.C.

4. The third respondent had specifically asked the names of persons who were eligible for the post of Junior Assistant and Record clerk from among existing non-teaching category of employees. But the fourth respondent in a mala fide manner, had informed the third respondent that as the College was on vacation, the certificate of the nonteaching candidates can be collected and sent only on the reopening of the College. The said contention was highly false and mala fide. The non-teaching staff were working throughout the vacation by turn. The petitioner was kept under dark as regards the said fact as well as the other non-teaching staff. It was only later the petitioner came to know all the steps taken by the respondents to fill up the post of the Junior Assistant. The petitioner gave a representation on 27.9.1994 annexing all the certificates of his qualifications. He being the senior-most from the feeder category, he was eligible to be appointed as a Junior Assistant. Hyder Ali who was Lab. Assistant, had also given a No Objection Certificate. Even though the said representation of the petitioner was received they had not considered his claim in an illegal manner. The petitioner further contends that the post of Junior Assistant can be filled up only from among the categories of Record Clerk and Lab. Attenders, Lab. Assistants, Herbarium Keepers on seniority basis. Therefore, the appointment of the fifth respondent was totally illegal

and in violation of Rule 11(4)(i) of the Rules framed under the Act. The question of filling up of a post on compassionate ground, would arise only for the post which are available for direct recruitment. The respondents cannot override the specific statutory directions given by the Government. The fifth respondent was only an S.S.L.C. and a raw student and therefore, his appointment was not in the interest of the College also. The respondents have passed orders as well as disposed of the appeal on extraneous grounds and hence liable to be quashed.

5. In the counter filed by the fifth respondent, it is contended that the petitioner has a right to file revision under Section 41 of the Act. In view of certain disputes between the erstwhile management and the staff,the Government has taken over the College and appointed a Caretaker. The present Caretaker is the Regional Joint Director of Collegiate Education, Madurai region, who has all the powers of the College Committee including the powers of making appointments. The fifth respondent has completed his Plus Two successfully. He secured admission to an Engineering Course in the Kancheepuram Arulmigu Meenakshi Amman Engineering College, Kancheepuram, for the academic year 1994-95, but his father who was the Principal in-charge of the fourth respondent College, passed away suddenly on 27.2.1994. He being only earning member in the family and due to the said circumstances, he was not in a position to continue the Engineering course. In view of the instructions of the Government of Tamil Nadu regarding compassionate appointments, he applied to the fourth respondent College for being considered for appointment. At that time, there was a vacancy in the post of Junior Assistant and therefore, he was appointed with effect from 12.12.1994. Appeal filed by the petitioner under Section 37 of the Act was also dismissed. The contention of the petitioner that the post should be filled up only on the basis of promotion was not correct. Rule 11(4)(i) only states that promotion in respect of non-teaching staff shall be made on seniority basis, but it does not preclude resorting to direct recruitment. He was offered appointment as a Junior Assistant for which he was fully qualified . Therefore, the fact that the petitioner was a Post-Graduate was not relevant.

6. Mr.K.V.Subramanian, learned counsel for the petitioner raised the following submissions:-
(i) Neither the Act nor the Rule contemplates compassionate appointment in private management. The Government Orders issued in the context of compassionate appointments are applicable only to public services and not to private colleges which are governed by a specific Act and Rules.
(ii) In terms of the Act and Rules, a post relating to non-teaching staff can be filled up only on seniority basis and no direct recruitment is contemplated. Direct recruitment is possible only in the case of teaching staff.

(iii) Reliance is placed on the judgment of a Division Bench of this Court in M.REETHAMMAL AND ANOTHER v. THE STATE OF TAMIL NADU ETC. (2 002 Writ L.R., 514) in support of his contention that when Rules have been made by the Government as empowered under Sections 17 and 53 of the Act, the Private Colleges are bound to follow the same. Reliance is placed on the directions issued by the Division Bench directing promotion of the petitioner to the post

of Assistant in terms of the Rules.

(iv) The fifth respondent was a minor at the time of the appointment and thus rendering the appointment invalid and also exposes utter mala fides and favouritism by the management which had been approved by the Government also in an improper manner. As a result of appointing the fifth respondent, the petitioner had completely lost his chances of promotion as the fifth respondent happens to be younger to him and only one post of Junior Assistant was available in the College.

8. Mr.Vijay Narayan, learned counsel appearing for the fifth respondent contends that the College was only following the Government Orders by appointing the fifth respondent. The fifth respondent had rightly relied on G.O.Ms.No.1499 Labour and Employment dated 3.8.1989 for appointing the fifth respondent and hence the same was perfectly in order. The object of compassionate appointment was to provide relief to the affected family and in fact the fifth respondent had discontinued his study only as a result of the death of his father and opted for employment which was available. It would result in injustice if the petitioner should be discharged from the post which he has been holding for the past seven years. As regards the petitioner having been a minor at the time of appointment, learned counsel refers to the letter dated 22.11.1991 issued by the Government of Tamil Nadu stating that there was no bar for appointing a candidate below the age of 18 years on regular basis if he is otherwise qualified for the post and satisfies the conditions prescribed for compassionate appointment. Learned counsel also relies on the judgment of the Supreme Court in UMESH KUMAR NAGPAL v. STATE OF HARYANA & ORS. (J.T. 1994 (3) S.C., 5 25) which will be dealt with later.

9. I have considered the submissions of both sides. The issue of compassionate appointment had reached certain undesirable proportions which cannot stand scrutiny from the point of view of law and public policy. Compassionate appointments in the case of employees loosing their lives in the performance of their duties, such as Policeman being shot down by criminals while he is conducting a raid, an army solider loosing his life while defending his country, an electrical foreman or electrician getting electrocuted while discharging his duties, would be justified and in fact in such cases, employment should be provided for all the unemployed members of the family. Many such examples can be given and it is only for such employees compassionate appointment was visualised and should be provided, but not for a Government Servant who dies due to the natural or unnatural reasons which have nothing to do with his duties. Compassionate appointments even in such cases would only result in the Government service being converted into hereditary service. Reliance placed on the judgment of the Supreme Court in J.T.1994 (3) S.C., 525, by Mr.Vijay Narayan is also inappropriate as it deals only with the Government Orders issued in the context of public service. Even in that judgment the Supreme Court had observed that the issue of compassionate appointment had created a "good deal of obfuscation" on the issue and that as a Rule, appointments in the public services should be made strictly on the basis of open invitation of applications and appointment on merits. The Supreme Court had further proceeded to observe that to the said Rule there were certain exceptions like compassionate appointment only to meet certain contingencies and in fact the Supreme Court deprecated the practice of

ordering appointment on compassionate ground as a matter of course without regard to the circumstances of the case including the real status and the financial position of the family. At any rate, it is not necessary for me to go further into the said issue. This case has nothing to do with the various Government Orders which have been issued only in the context of public service.

10. It is totally erroneous on the part of the respondents to have placed reliance on the Government Orders which apply only to public services and not to Private Colleges which are governed by their own statutory provisions. Section 15 enables the Government to make Rules in consultation with the University regulating the condition of service, including promotion, Pay and Allowances etc. and in respect of disciplinary matters of the teachers and other persons employed in any Private Colleges. In the Rules framed under the Act, Rule 11 deals with condition of service of teachers and other persons in the College and in particular Rule 11(4)(i) of the Act deals with promotions and appointment of teaching staff as well as non-teaching staff. While in respect of teaching staff, it is stated that promotion shall be made on grounds of merit and ability, seniority being considered only where merit and ability are approximately equal, in respect of nonteaching staff promotion shall be made on seniority basis provided the other conditions regarding the qualifications are satisfied.

11. Therefore, the appointment to the non-teaching staff could be made only as provided under the Act and Rules namely, on promotion by seniority, subject to if the senior-most person in the feeder category satisfies the qualifications for the post. In this case, there is no dispute over the eligibility of the petitioner to be promoted. Mr.Vijay Narayan also does not dispute the fact that Rule 11(4)(i) does not visualise direct recruitment, but would contend that compassionate appointment is in the form of an exception. Therefore, it is not disputed that except for the contention relating to compassionate appointment, in terms of the Rule the petitioner ought to have been promoted.

12. In the judgment of the Division Bench in 2002 Writ L.R., 514 cited above, the Division Bench dealt with a case of interpretation of the very same Rules namely, Rule 11(4)(ii) and the appointment of one of the respondents by direct recruitment as Assistant by the Government relaxing the Rules. The Division Bench came down very heavily on such relaxation being granted in violation of the Rules and ordered promotion of the aggrieved person even though he had not challenged the Government Order granting relaxation to the appointee. Therefore, if even direct recruitment by relaxing the Rule could be incompetent, afortiori, in this case the petitioner stands on a better footing. Firstly, in this case, even such a relaxation is not available. Secondly, the Government Order which is relied upon by the respondents namely, G.O.Ms.No.1499 dated 3.8.1989 is available only in respect of public services. The preamble clearly states that it relates to procedure of recruitment into public service in respect of the deceased Government Servants. The object of the order also makes it clear that it is applicable only to the deceased Government Servants.

13. Therefore, on the above ground alone namely, that the G.Os. do not apply to private institutions, the impugned order appointing fifth respondent relying on the said Government Orders and ignoring the statutory provisions as mentioned above, is liable to be set aside. The Rules are binding not only on the respondents, but also the authorities who had in this case chosen to ignore their own Rules.

14. The factual background in which the fifth respondent came to be appointed ignoring the claims of the petitioner also suggest favouritism by throwing aside propriety and the statutory provisions. Even before the appointment was made, the petitioner had intimated his availability along with his qualifications and also a "No Objection Certificate" from the co-employee. In fact promotions are not expected to be made only on the eligible persons applying for promotion. If the post is vacant, it is the duty of the authorities to fill up the vacancy and to consider the claims of all eligible candidates. In this case, when the Government called for the particulars of the existing staff, management in a very clandestine manner chose not to give the required particulars and by giving an unacceptable excuse that during vacation period they were not able to furnish particulars. The entire exercise is therefore, calculated to favour the fifth respondent.

15. Mr.Vijay Narayan after ascertaining the facts fairly admitted that the fifth respondent was appointed as a minor even before he had attained majority and the said fact also adds to the gravity of the violations of the Rules and Regulations as indulged by the respondents. Such action of appointing minors have to be condemned and deprecated. It is true that the fifth respondent has now attained majority. But that cannot mitigate the illegality and the lack of bona fides when the appointment was actually made. Here again reliance is placed on the Government instructions dated 22.11.1994 clarifying that there is no bar in appointing a candidate on compassionate ground below the age of 18 years. The less said is better about the Government Orders and letters which have been issued contrary to basic rules statutory requirements and glaringly opposed to public policy. Such orders are issued by Government Servants/Officials in furtherance of their own self interest and unprincipled ambitions. At any rate as stated earlier, none of the Government Orders or instructions issued thereon can have any relevance to the Colleges which are governed by a specific Act and Rules. In terms of the judgment of the Division Bench cited above, even as regards the appointment to public services/ Colleges, Government Orders which run contrary to the Act and Rules cannot be enforced and any such appointment made on the strength of such Government Orders or orders of relaxation cannot be held as valid.

16. Learned counsel for the petitioner states that the fifth respondent's father was not only a Principal in-charge of the College before he died, but also belong to the group of the management itself, and hence the fifth respondent belongs to a very affluent family and was not in need of employment. On the other hand, the petitioner is a poor person and the only avenue of promotion has been sealed as a result of the appointment of the fifth respondent who was very much junior to him in age. Though the

contention of the petitioner that the fifth respondent hails from an affluent family, is not specifically denied, Mr.Vijay Narayan contends that the fifth respondent gave up his further education only because of the appointment. I am inclined to hold that this circumstance cannot lead to any sympathy in favour of the fifth respondent. Firstly, no individual can seek for sympathy arising out of any situation resulting from his own illegal conduct and doing something contrary to the Rules. Secondly, on practical analysis, considering the well known position of the unemployed educated youths as on date and even Post Graduates being prepared to accept the posts of Last Grade, the fifth respondent has not sacrificed anything. He had cleverly got a job even during his minority after having merely passed S.S.L.C. and in a position to be surely promoted to the highest post on the managerial side of the College. There can be no sympathy towards such an individual who is appointed highhandedly regardless of Rules and Regulations. In contrast, this Court has to consider the fate of the petitioner who is also poor and whose claim for promotion is totally shut out due to such illegal action which also has the blessings of the official respondents. The petitioner had acquired many additional qualifications after joining as a Herbarium Assistant, namely becoming a Graduate and later Post Graduate with other qualifications of Typewriting in English and Tamil which are totally lacking in the fifth respondent. It is true that there is no vested right for an employee to be promoted as a result of contingencies in the service such as any changes in the rule position or a post being abolished or higher qualification being prescribed etc. There are no such contingencies in this case. In this case, the petitioner has been a victim of glaring mala fide action of favouritism by the respondents. It is not denied that the petitioner was fully qualified as on the date of the appointment of the fifth respondent and the only reason for his non-promotion is filling up the vacancy by the fifth respondent.

17. Mr.Vijay Narayan pleaded that the appointment of fifth respondent may not be disturbed by any order to be passed by this Court as he is in service for the past seven years. The pendency of this writ petition for the past seven years cannot result in depriving the rights of the petitioner nor wipe out the illegality in the appointment of the 5th respondent. This Court has no further choice than to order promotion of the petitioner with effect from the date on which the fifth respondent was appointed. But to have the service of the fifth respondent to be protected in a proper manner is within the choice of the college subject to approval by the official respondents who appear to be ever-ready to oblige the fifth respondent. It is up to the respondents to create any supernumerary post or additional post to accommodate the fifth respondent if the Rules permit.

18. Therefore, I am inclined to allow the writ petition subject to the following observations:-
(i) The petitioner shall be promoted as Junior Assistant with effect from the date on which the fifth respondent was appointed, with all the consequential benefits including Pay and allowances due to the said post and continuity of service in the promoted post.

(ii) The appointment of the fifth respondent is set aside. The respondents are at liberty to reappoint him in service by creating any

additional or supernumerary post subject to the Rules and Regulations. In the event of passing such orders, the fifth respondent shall be placed below the petitioner in seniority.

19. The writ petition is ordered in the above terms. No costs. Connected miscellaneous petition is closed as unnecessary.

Internet : Yes.

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